

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

No. 77-6049 *B*

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 77-6049

SECRETARY OF THE INTERIOR, *et al.*, Appellants,

v.

COUNTY OF SUFFOLK, *et al.*, Appellees.

On Appeal From the United States District Court for the
Eastern District of New York

BRIEF OF APPELLANTS
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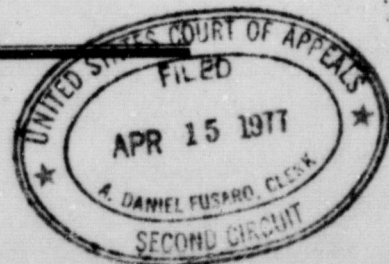


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SECRETARY OF THE INTERIOR, et al.,)
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 Appellants,)
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 v.) No. 77-6049
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 COUNTY OF SUFFOLK, et al.,)
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 Appellees)

BRIEF OF APPELLANTS
NATIONAL OCEAN INDUSTRIES ASSOCIATION, ET AL.

Appellants National Ocean Industries Association (NOIA) and eleven NOIA members^{1/}, all of whom appeared as intervenor-defendants below, invoke this Court's jurisdiction under 28 U.S.C. §1292(a)(1) to review the final judgment entered on February 17, 1977, by Judge Jack B. Weinstein of the United States District Court for the Eastern District of New York. Judge Weinstein's order declared Outer Continental

1/ Joining NOIA in this appeal are eleven of its members, all of whom participate in one or more aspects of the broad range of activities relating to off-shore exploration, development and production of oil and gas -- Continental Oil Company, Diamond M. Drilling Company, Digicon, Inc., Dresser Industries, Inc., Houston Oil & Minerals Corporation, Livingston Shipbuilding Company, Murphy Oil Corporation, National Supply Company, Ocean Production Company, Transco Companies, Inc., and Zapata Corporation.

Shelf (OCS) Sale No. 40 (Mid-Atlantic) null and void, notwithstanding the fact that this Court on August 16, 1976 stayed, and then on October 14, 1976 reversed his earlier order of August 13, 1976 which had preliminarily enjoined Sale No. 40.

QUESTIONS PRESENTED

(1) Whether, under the "rule of reason" applicable to judicial review proceedings under the National Environmental Policy Act (NEPA), the lower court erred in holding that the environmental impact statement for Sale No. 40 (EIS) was inadequate because it failed (a) to pinpoint locations for pipeline landfalls, (b) to identify and analyze municipal and county land-use regulations in the Mid-Atlantic area and (c) to speculate about future political opposition to onshore OCS facilities?

(2) Whether, under the "rule of reason," the lower court erred in holding inadequate the discussion in the Sale No. 40 EIS and in a related programmatic environmental impact statement (PEIS) of certain "alternatives" to the sale -- i.e. (a) separating exploration and development and (b) selecting different tracts for leasing?

(3) Whether the lower court erred in concluding that the Secretary's decision to authorize Sale No. 40 was "arbitrary and capricious" solely on the basis of controverted de novo trial testimony which criticized internal Interior

decision-making memoranda on the ground that they understated the financial costs and overstated the production rates associated with Sale No. 40?

(4) Whether the lower court erred as a matter of law and equity in declaring Sale No. 40 null and void?

STATEMENT OF THE CASE

This is the third time that appellants have been before this Court seeking relief from orders of Judge Weinstein in this litigation. The two previous appearances (No. 76-6122) were occasioned by his order of August 13, 1976, in which he attempted to preliminarily enjoin the Secretary of the Interior from conducting OCS Sale No. 40.

A. The Preliminary Injunction Order.

The lower court's August 13 order was issued following compilation of the largest part of the record which is now before the Court. At that time, Judge Weinstein took testimony at 11 days of hearings, which generated 2,814 pages of transcript and resulted in the receipt of 174 exhibits, most of which were introduced by plaintiffs to support their contentions that the EIS for Sale No. 40 and the related PEIS for the accelerated OCS leasing program inadequately discussed a broad range of environmental, policy and procedural aspects of Sale No. 40.

After the receipt of this evidence, the lower court issued a 79-page opinion (JA 156) which upheld the adequacy of the impact statements with respect to all of the issues raised by the plaintiffs:

"[O]n balance, the impartial reader of the EIS is driven to the conclusion that, within the limit of reasonable researchers and writers, a studied effort was made to present a fairly grim picture of possible environmental difficulties. If anything, the studies are almost too detailed and encyclopedic for a lay executive to fully comprehend. The Final EIS Sale No. 40, together with the PDOD prepared by staff to summarize and clarify the issue for decision, satisfactorily meet both the spirit and the letter of NEPA requirements in all respects except one" (Order 31, JA 186).

The plaintiffs' various contentions as to the alleged inadequacy of the EIS's discussion of environmental impacts were dismissed on the ground that

"In view of the enormous range in probabilities, an administrator such as the Secretary might well have concluded that the gross data available sufficiently apprised him of the overall dangers, so that further refinements were not worth the delays required to make them." (Order 19, JA 174).

As to the contention that operating procedures and the like were inadequate, the court found that there was

"no doubt of the technical capacity to establish drilling platforms, undersea pipelines and shore based facilities adequate to fully exploit these resources in the OCS over the next twenty-five years. Testimony and exhibits describing production in the North Sea, Gulf of Mexico and other areas demonstrated this capability as the most clearly established fact in the case." (Order 7, JA 162).

As to the integrity of Interior's decisional processes, the lower court rejected the contentions of the plaintiffs as unproved. (Order 32-33, JA 187-88) Indeed, the lower court specifically found that through publication of the EIS, hearings and conferences, "the state and local political entities most affected were advised of the plans, their implications, and their dangers" (Order 31, JA 186) and that "Congress was fully advised" (Order 32, JA 187).

Notwithstanding this general validation of the EIS, Judge Weinstein determined to enjoin Sale No. 40 because of a single purported defect in the EIS, first identified by him upon the close of all the evidence taken at the preliminary injunction hearings (P.Tr. 2636)^{2/} -- that State decisions to bar pipelines from the Sale No. 40 area were "not inconceivable" (Order 55, JA 211) and that while the EIS did discuss such state authority over pipelines,^{3/} in Judge Weinstein's view, the "total discussion" evidenced "apparently no real awareness" of the difficulties associated with obtaining State approval for the placement of pipelines. (Order 61, 63, JA 216-218).

^{2/} Since the preliminary injunction hearing and trial transcripts were not consecutively paginated, we will refer to the transcript of the preliminary injunction hearing as "P.Tr." and the transcript of the trial as "T.Tr."

^{3/} See pp. 32,35, infra.

B. The Prior Appeal of the Preliminary Injunction.

Appellants NOIA, et al., as well as the Secretary, immediately filed notices of appeal with respect to Judge Weinstein's preliminary injunction order and simultaneously moved this Court for a stay of that order pending their appeal. On August 16, 1976, a motions panel of this Court granted appellants' motion holding that

"We find nothing in this case which satisfies us that the August 17, 1976 sale, in and of itself, will cause appellees any irreparable injury. On the other hand, the national interests, looking toward relief of this country's energy crisis, will be clearly damaged if the proposed sale is aborted."
(9 ERC 1793, 1794).

Thereafter, plaintiffs applied to Justice Thurgood Marshall in an attempt to stay this Court's August 16 order and thereby, in effect, reinstate Judge Weinstein's August 13 preliminary injunction. After hearing oral argument from the parties and taking the matter under advisement, Justice Marshall orally announced on August 17 that he would not grant appellees' application for stay.^{4/}

Immediately after the oral announcement of Justice Marshall's decision, Sale No. 40 took place, resulting in the sale

^{4/} On August 19, Justice Marshall issued a written order stating the reasons for his action. 97 S.Ct. 4 (1976).

of leases on 93 of the 154 tracts offered in the sale No. 40 area and payment by the successful bidders to the Federal Government of more than \$1.1 billion. (Ex. T-5B).

Since this Court's August 16 order constituted only an interim stay of the August 13 injunction, it was necessary for the parties to return to this Court for plenary briefing and argument of the merits of that injunction. Following an exchange of voluminous briefs and after oral argument, addressed to all of the issues raised by Judge Weinstein's August 13 order, including those which he decided in defendants' favor, a panel of this Court heard oral argument, and on October 14 reversed the August 13 preliminary injunction. While affirming the rationale of the August 16 order that the plaintiffs had not shown irreparable injury, this Court went on to address the issues decided by Judge Weinstein:

"An equally important requirement for a preliminary injunction is the demonstration of the probability of success on the merits. *Id.* This issue has now been more fully briefed and argued and we have been able to review a more complete record, including the Programmatic Environmental Impact Statement and the EIS for Sale No. 40. These documents totaling almost 5,000 pages, contain numerous references to the possible lack of State cooperation relative to pipe line location and usage and the alternative use of tankers. An evaluation of these statements measured by the 'practical rule of reason' creates some doubt as to the probabilities of plaintiffs' success on the merits." (9 ERC 1794, 1795)

C. Further Proceedings in the Trial Court.

Following this Court's October 14 order and their return to the trial court, defendants urged that there was no need for any additional testimony or other evidence in this case because there had been a more than adequate opportunity for the plaintiffs to raise every one of their theories concerning the alleged invalidity of the Sale No. 40 EIS at the preliminary injunction hearings and because NEPA litigation should not involve the taking of de novo evidence but instead should be limited to the administrative record. (Federal Defendants' Pretrial Conf. Memo., dated Nov. 2, 1976). Judge Weinstein rejected this position and determined to allow the plaintiffs an additional opportunity to develop new evidence and new legal theories in support of their thesis that Sale No. 40 had been held in violation of NEPA.

Thus, plaintiffs called eight witnesses who testified principally about the alleged present attitudes of New Jersey towns and counties toward Sale No. 40, as well as George Donkin, who criticized the Secretary's internal decisional documents -- which had been produced pursuant to discovery demands and which had been admitted into evidence over the objection of defendants (P. Tr. 102, 104) -- for allegedly understating the investment costs associated with Sale No. 40 and for allegedly overstating the production rates that might be anticipated in extracting Sale No. 40 oil and gas.

In response, defendants called eight witnesses.

Most significant for present purposes was Mr. Brunjes, a Shell Oil Company pipeline planning expert, whose testimony established that pipelines with landfalls at virtually any point of the New Jersey or Delaware coasts, including inside Delaware Bay, would be economically preferable to the use of tankers to land Sale No. 40 oil. NOIA offered this evidence to show that the vetoing of pipeline landfalls by a particular New Jersey town or even a whole county would not precipitate the use of tankers in the manner hypothesized by Judge Weinstein in his August 13 order. (T.Tr. 846-65, JA 1720-1739).

To further refute the rationale of Judge Weinstein's early order that states might veto pipelines and force the use of tankers, the federal defendants called Ms. Gresham, an employee of the New York office of the Bureau of Land Management (BLM). In her testimony, Ms. Gresham described the "tract-selection" process by which BLM identified OCS tracts for subsequent study in the Sale No. 40 EIS. She testified that the states took advantage of the opportunity extended to them by Interior to comment upon BLM's tract selections, but failed at that time (just as they later failed in their subsequent comments upon the draft EIS, see pp. 37-38, infra) to suggest that they had any intention to bar pipelines from the Sale No. 40 area.

D. Judge Weinstein's Final Judgment.

On February 17, 1977, Judge Weinstein handed down the final memorandum and order that is the subject of this instant appeal. In that opinion he reaffirmed, in full, his prior order of August 13, failing even to mention the fact that this Court had reversed that order (Dec. 1, JA 23). Moreover, the largest part of Judge Weinstein's February 17 decision was devoted to a further articulation, and in some instances an extension, of the original theory upon which he had relied in his August 13 order -- that NEPA was violated by Interior in going forward with Sale No. 40 because of the "failure to consider [the] impact of state and local exercise of regulatory powers" (Dec. 9, JA 31) , particularly as they related to the use of pipelines to land Sale No. 40 oil (Dec. 9-43, 71-74, JA 31-65, 94-97).

Just as he had unearthed this issue himself at the preliminary injunction hearings in 1976, Judge Weinstein discerned additional support for it in the trial record on the basis of theories which he originated or evidence which he largely developed through his own interrogation of witnesses. Despite the fact that plaintiffs had at no time in their pleadings, pretrial memoranda, or own evidentiary submissions complained of the EIS's failure to designate particular pipeline corridors, Judge Weinstein seized upon evidence introduced through Mr. Brunjes, notwithstanding his testimony that it was "very premature at this time to speculate as to an exact routing" for pipelines (T.Tr. 942, JA 1771), to hold that Interior violated NEPA by not defining in the EIS the

precise locations of pipelines that might one day be laid from the Sale No. 40 area.^{5/}

Judge Weinstein's identification of purported NEPA violations did not, however, end with his focus upon State and local land use regulation. In two related portions of his opinion, he held both that the alternatives of separating exploration and development and of selecting different tracts for leasing had not been adequately considered. In so doing, he relied principally upon his own cross-examination of Ms. Gresham in which he established that she had not personally conducted a NEPA analysis of the onshore impacts of leasing particular tracts nor considered alternative leasing procedures when she participated in the pre-EIS tract-selection process.

The only theory upon which the lower court relied in its final order that pertained in any way to the plaintiffs' evidence involved the determination that the Secretary's decision to go forward with Sale No. 40 was arbitrary and capricious, because it was based upon allegedly mistaken assumptions in the Secretary's internal decisional memoranda (PDOD) as to the investment required by industry to explore and develop the Sale No. 40 region and as to possible future rates of production -- not total amounts of reserves -- of oil and gas in that area. In so ruling, Judge Weinstein merely set out long extracts from Mr. Donkin's direct testimony and neglected to mention the serious doubt cast on that

^{5/} The sua sponte nature of Judge Weinstein's resolution of the pipeline corridor issue was further brought out by his statement that the Brunjes testimony, not plaintiffs' evidence or arguments, brought this issue "to a head in my mind." (T.Tr. 1228, JA 1930).

testimony by other evidence in the record or by inconsistencies^{6/} in the Donkin testimony developed during cross-examination.

Although he disclaimed decisional reliance on the matter, Judge Weinstein concluded his discussion of Interior's compliance with NEPA by holding that there was "strong circumstantial evidence that the decision to proceed with Sale No. 40" was not made in good faith. (Dec. 82, JA 105). In so holding, Judge Weinstein relied exclusively upon exhibits that had been submitted during the preliminary injunction phase of the litigation, plus a single statement at trial by one witness that he had been informed in 1965, four years before the passage of NEPA, that Interior was considering an OCS sale in the Atlantic area in 1970 (Dec. 75-76, JA 98-99). Judge Weinstein failed to explain why this one piece of new evidence affected the conclusion which he had reached in August of 1976 that "on balance, the Court has not been convinced that the Secretary and his subordinates did not attempt to execute NEPA honestly" (Order 32-33, JA 187-188) no longer obtained in February of 1977.^{7/}

6/ For example, Judge Weinstein accepted without question the expert's conclusory testimony that pipeline costs were significantly higher than those referred to in the PDOD (Dec. 48-49, JA 70-71), and failed even to acknowledge the testimony of Mr. Brunjes that the PDOD pipeline cost estimates corresponded almost exactly with those in the economic feasibility study which he had done for Shell Oil (T.Tr. 1062-64, JA 1845-47).

7/ Upon the close of the evidence at trial, Judge Weinstein outlined the principal issues which he believed should be addressed by the parties in their briefs. At that point, he failed even to suggest that the general good faith of Interior in deciding to go forward with Sale No. 40 remained an issue in this case (T.Tr. 1226-30, JA 1928-32), and accordingly none of the parties briefed that issue in their post-trial submissions.

Finally, Judge Weinstein concluded that there was no feasible remedy available to the plaintiffs to respond to the purported NEPA violations which he had found, other than a declaration that Sale No. 40 was null and void. Thus, Judge Weinstein framed his decree as though his preliminary injunction order of August 13 had not been reversed by this Court and more than one billion dollars had not been invested in the Sale No. 40 project.

On March 4, 1977, appellants NOIA and the Federal Government filed notices of appeal with respect to Judge Weinstein's February 17 ruling and on March 21 obtained a ruling from this Court that their appeal should be set for expeditious hearing.

ARGUMENT

Before embarking upon an extended discussion of the three grounds upon which Judge Weinstein rested his decision, we wish to stress some basic points which the Court should consider in passing upon the issue in this case -- Interior's compliance with NEPA in authorizing Sale No. 40.

First, we remind the Court of the basic findings that Judge Weinstein made in his August 13 order, which he reaffirmed in his February 17 order -- e.g., that the nearly 2000-page EIS for Sale No. 40 and the 2700-page PEIS for the accelerated leasing program adequately dealt with the vast majority of the complex and difficult issues bearing upon Sale No. 40, a massive program which will unfold over a period of decades. As the Supreme Court recently stated, "appropriate allowance for the inexactness of all predictive ventures" must be made in judging NEPA impact statements, like the

EIS and PEIS here, which deal with projects that stretch out over many years and cannot be defined with certainty at the time the project is being considered. Kleppe v. Sierra Club, 427 U.S. 390, 402-03 n. 14 (1976). But in the light of the nature of the issues upon which he relied to render judgment for plaintiffs, it is obvious that Judge Weinstein was not willing to make that "appropriate allowance" in passing upon Interior's compliance with NEPA in this case. So it was that Judge Weinstein for the first time in the history of extensive litigation concerning off-shore oil and gas leasing, voided an OCS sale on the basis of what he perceived to be a few defects in the EIS and the decision-making documents used by Interior.

Second, the issues which Judge Weinstein found lurking in this case have been potentially present in every other NEPA/OCS case, yet have never been seized upon by the courts as a basis for invalidating an OCS leasing decision. See Sierra Club v. Morton (MAFLA) 510 F.2d 813 (5th Cir. 1975); NRDC v. Morton, 458 F.2d 827 (D.C.Cir. 1972); State of Alaska v. Kleppe, 9 E.R.C. 1497 (D.D.C. August 13, 1976), on appeal, D.C.Cir. No.76-1829; Southern California Association of Governments v. Kleppe, 413 F.Supp. 563 (D.D.C. 1976); People of California v. Morton, 404 F.Supp. 26, 30 (C.D.Calif. 1975),

on appeal, 9th Cir. No. 76-1431; Public Citizen v. Morton, (D.D.C. 74-739, 1975).^{8/} Indeed, as we will show below, many of these cases, particularly the Fifth Circuit's MAFLA decision, have directly dealt with the very issues decided by Judge Weinstein and have rejected the interpretation of NEPA embraced by him in striking down Sale No. 40. Judge Weinstein did not even attempt to reconcile his decision with this long line of authority; he instead simply ignored these prior cases.

Finally, OCS operations in the Sale No. 40 area involve less environmental risk than most other OCS areas. Thus, the Chairman of the Council on Environmental Quality testified below that the Gulf of Alaska OCS leasing areas were "much more hazardest^{9/} (sic) . . . than the mid-Atlantic" (Peterson Dep. p.71, JA 2146).

8/ NRDC v. Morton is the only case in which an OCS sale was enjoined on the basis of EIS inadequacy. That proceeding arose shortly after the passage of NEPA when the Department of the Interior, like most other government agencies, had an imperfect understanding of its requirements and dealt with a 67-page EIS. The court in that case did not suggest that any of the "defects" discovered by Judge Weinstein here would have led it to declare the impact statement inadequate.

9/ Mr. Peterson continued (Dep. p.72, JA 2147):

"So, the combination of these factors led us to be appreciably more concerned about the Gulf of Alaska than any other Continental Shelf Program.

"Q. Then, is it your testimony that these factors, which you just referred to, do not exist, to the same degree in the mid-Atlantic region?

"A. That is right."

See also, Ex.P., pp.54-59, where an EPA-sponsored report concluded that, aside from the North Atlantic, the Mid-Atlantic OCS was from a biological perspective the least hazardous of all potential new OCS areas.

In short, Judge Weinstein struck down Sale No. 40 on relatively insignificant grounds, which were themselves articulated in contravention of a number of prior judicial precedents, to spare the Mid-Atlantic OCS from development, notwithstanding the relatively small risk that serious environmental harm would occur there.

I. JUDGE WEINSTEIN ERRED IN DETERMINING
THAT THE EIS INADEQUATELY DEALT WITH
THE ISSUE OF LAYING PIPELINES FROM
THE SALE NO. 40 AREA

In the longest section of his opinion, Judge Weinstein returned to the rationale of his August 13, 1976, preliminary injunction order and held, once again, that Interior had violated NEPA by inadequately considering the way in which state and local regulation could effect the laying of pipelines from the Sale No. 40 area. Curiously, however, in a decision which roundly condemns Interior for its allegedly "abstract" treatment of this question (Dec. 19, JA 41), Judge Weinstein's own rationale is, to say the least, difficult to comprehend.

To be sure, he leaves no doubt that his invalidation of the Sale No. 40 EIS turned, at least in part, upon the failure of Interior to define, at the EIS stage of the project, precise

pipeline corridors. But it also appears that Judge Weinstein may have had a more general complaint -- i.e., that the EIS should have provided more information about the extent of state and local regulation of land-use as it pertains to OCS facilities; that the EIS should have speculated about the extent to which such power might be exercised to effect OCS activities; and that the impacts on the project resulting from such exercise of land-use regulation power should have been more extensively studied in the impact statement. (Dec. 15-19, JA 37-41).

As we will now show, whatever Judge Weinstein's reasons for declaring the impact statement inadequate, he has made clear and obvious errors both as to the meaning of NEPA and a related statute, the Coastal Zone Management Act (CZMA), and has grossly misconceived the evidence in this case.

A. Judge Weinstein's Decision Ignores
the Rule of Reason Applicable to
Adjudicating the Adequacy of NEPA
Impact Statements

The touchstone for legal analysis of the adequacy of the EIS is the "rule of reason" that has been adopted by all courts in applying NEPA. As this Court recently held in setting forth a succinct and clear statement of that rule:

"[A]n EIS is required to furnish only such information as appears to be reasonably necessary under the circumstances for evaluation of the project rather than to be so all-encompassing in scope that the task of preparing it would become either fruitless or well nigh impossible." NRDC v. Callaway, 524 F.2d 79, 88 (2d. Cir. 1975).

All OCS/NEPA cases that have received appellate scrutiny in this and in other circuits have similarly recognized that an impact statement for such a transaction cannot deal exhaustively with each of the many issues that it raises, but instead need only develop in reasonable detail the issues of primary concern. Kleppe v. New York, 9 ERC 1794, 1795 (2d. Cir. 1976); Sierra Club v. Morton (MAFLA), 510 F.2d 813, 819 (5th Cir. 1975); NRDC v. Mo on, 458 F.2d 827, 834 (D.C.Cir. 1972). See also, New York v. Kleppe, 97 S.Ct. 4 (1976) (opinion of Mr. Justice Marshall). Indeed, there are particularly strong reasons for applying the rule of reason to an OCS sale, since it

"is a unique form of federal action. It does not involve a single undertaking or a project which becomes a fait accompli the day the decision to proceed is made. Because it contemplates numerous successive lessor-lessee relationships involving activities over many areas and over many years, the agency's continuing opportunity for making informed adjustments has a major effect upon our evaluation of the sufficiency of the materials contained in the EIS itself."

Sierra Club v. Morton (MAFLA), supra, 510 F.2d at 828.

The MAFLA case, which was nowhere acknowledged by Judge Weinstein, and the principle for which it stands are particularly applicable to the basic issue upon which Judge Weinstein rested his decision. As he consistently recognized (Order 76, JA 231; Feb. 14, 1977, Tr. 30, JA 1934), the production or development phase for Sale No. 40 -- the first instance when pipelines or tankers might be utilized to land OCS oil -- will not take place for at least three years.

As the evidence clearly shows (P.Tr. 2543-67) and as Judge Weinstein has also recognized (Feb. 14 Tr. 24, JA 1933) during that time the Secretary has a broad range of regulatory authority by which to mitigate any environmental adverse consequences that might arise in connection with the placement of pipelines. In that regard, the EIS indicates that a supplemental impact statement on the development/production phase, when pipelines will be designed and constructed, may be utilized to assess industry plans. (III EIS 44). Secretary Andrus has already announced that if this appeal is successful Interior will publish a supplemental EIS that will deal with the issues raised by Judge Weinstein.

The "rule of reason," which Judge Weinstein never once referred to in his legal analysis of the issues discussed in the first part of his opinion (Dec. 20-23, JA 42-45), as further buttressed by the MAFLA case, has implications which are of decisive significance here. It recognizes that

"it is entirely unreasonable to think that Congress intended for an impact statement to document every particle of knowledge that an agency might compile in considering the proposed action."
EDF v. Corps of Engineers (Tombigbee Dam)
492 F.2d 1123, 1136 (5th Cir. 1974).

Thus, NEPA does not require that every conceivable aspect of a project be researched to exhaustion, nor that "each problem be documented from every angle to explore its every potential for

good or ill."^{10/} The rule of reason instead recognizes that an agency must often act on the basis of reasonably available, if incomplete, information:

"It was for the Commission to arrive at rational, practical and principled conclusions upon the basis of reasonably available evidence." Citizens for Safe Power v. NRC, 524 F.2d 1291, 1297 (D.C. Cir. 1975). ^{11/}

In short, in the words of NRDC v. Morton, supra, 458 F.2d at 837, since "the resources of energy and research -- and time -- available to meet the Nation's needs are not infinite," NEPA cannot be construed as imposing an obligation upon an agency to collect all existing data bearing upon every issue discussed in an impact statement.^{12/}

In addition, the rule of reason excuses agencies from indulging in exercises of gross speculation, such as would be required (as we next show) in projecting the location of pipeline corridors from the Sale No. 40 region. Under the rule of reason, NEPA does not require a "crystal-ball" inquiry, NRDC v. Morton,

10/ Sierra Club v. Froehlke, 345 F. Supp. 440, 444 (W.D. Wisc. 1972), aff'd, 488 F.2d 946 (7th Cir. 1973). See also Aberdeen & Rockfish R.R. v. SCRAP (SCRAP II), 442 U.S. 289 (1975); Maryland-National Capital Planning Comm'n v. Shultz, 5 E.R.C. 1340 (D.D.C. 1973).

11/ See also, Union of Concerned Scientists v. AEC, 499 F.2d 1069, 1086 (D.C. Cir. 1974).

12/ See also, Brooks v. Volpe, 350 F.Supp. 269, 291 (W.D. Wash. 1972), aff'd, 487 F.2d 1344 (9th Cir. 1973).

supra, 458 F.2d at 837, nor does it require an agency to "foresee the unforeseeable." Scientists Institute for Public Information v. AEC, 481 F.2d 1079, 1092 (D.C. Cir. 1973).^{13/}

B. The Sale No. 40 EIS Cannot Be Invalidated for Failing to Identify Particular Pipeline Corridors.

Judge Weinstein's principal complaint against the EIS turns upon its failure "to project specific pipeline routes" and then to examine, in detail, the likely environmental impacts and financial costs associated with these "likely routes." (Dec. 35, JA 57). In taking this position, Judge Weinstein relied upon what he referred to as the "strong" analogy of an EIS for a highway connecting New York and Washington which omitted discussion of "the contemplated route" and other features of the highway. (Dec. 27, JA 49). But the very inapplicability of that analogy demonstrates the basic flaw underlying the lower court's decision on this point.

Unlike the New York-Washington highway, where both the end points and the terrain of the route are fixed and well known, neither the origin nor terminating points nor any of the other factors bearing upon pipeline routes are now known. As Appendix

^{13/} See also, Citizens for Safe Power, Inc. v. NRC, supra, 524 F.2d at 1297 n.9; Union of Concerned Scientists v. AEC, supra, 499 F.2d at 1084.

D to the opinion below shows, the Sale No. 40 tracts lie between 50-100 miles off the Atlantic coast and stretch 50 miles from their southern to northern bounds. There has never been any exploratory drilling on the tracts over this widely disbursed area, so that no one knows where, if at all, oil may be found.^{14/}

By the same token, Interior could not have known before Sale No. 40, when it published the EIS, which producer-refiners would successfully bid for tracts, let alone whether those with refining capacity in Northern New Jersey would discover oil on their tracts or whether others with capacity in the Philadelphia-Camden area would make finds offshore. Thus, there could have been no meaningful discussion of the points of origin and designation, or for that matter of even the number, of pipeline corridors that might run from the Sale No. 40 area to shore. As Mr. Brunjes (the witness whose testimony Judge Weinstein credited "in full" (Dec. 42, JA 64)) testified, this factor made it "very premature at this time to speculate as to an exact routing" for pipelines. (T.Tr. 942, JA 1771, emphasis supplied).

Compounding these uncertainties is the fact that virtually nothing is known about features of the terrain that would influence the routing of a pipeline. Thus, a detailed ocean bottom survey would have to be performed before any pipeline corridors can be fixed. (T.Tr. 1021-25, JA 1813-17). Not knowing the

^{14/} The fact that various bidders paid more than \$1 billion for Sale No. 40 leases is no guarantee that oil or gas underlies the Sale No. 40 area. In the MAFLA OCS sale around \$1 billion was spent for leases, but no reserves have yet been located there. II EIS 583.

termini of pipeline(s), no such ocean bottom survey can be feasibly made until after actual finds of offshore oil. (Id.)^{15/}

Thus, Judge Weinstein's demand that pipeline corridors should have been described in the EIS with the same precision as a new highway imposes a wholly unrealistic requirement unsupported by the evidence here (see pp 25-27 infra) that extends NEPA far beyond the parameters of the rule of reason. Indeed, one of the very cases upon which he relied in this section of his opinion, Scientists Institute for Information, Inc. v. AEC, 481 F.2d 1079 (D.C. Cir. 1973), shows the inapplicability of his construction of NEPA to a project as broad-ranging, complex, and presently formless as an OCS sale:

"Certainly NEPA does not require the Commission to forecast the deployment and effects of LMFBR power reactors in the year 2000 in the same detail or with the same degree of accuracy as another agency might have to forecast the increase traffic congestion likely to be caused by a proposed highway." Id. at 1092 (emphasis added).

^{15/} A comprehensive analysis of offshore planning introduced at trial -- the "Fact Book" for the New England River Basin Commission RALI Study (Ex. 203, JA 2824), shows why it is impossible, even now after Sale No. 40 has taken place, to make specific pipeline siting decisions or forecasts. As that study plainly shows, a variety of factors, including the size of the find, its distance from shore, meteorological and oceanographic conditions, the type of find and the final destination of the oil and gas, the numbers, types, and locations of fixed platforms, the processing procedures, the location of refining facilities, the types of bottom conditions and environmental suitability of particular landfalls all must be determined before specific pipeline corridors can be defined. See Id. at pp. 3.4-3.6, 3.31-3.33 (JA 2829-31, 2835-37).

As with so many other issues in this case, Sierra Club v. Morton (MAFLA), supra 510 F.2d 813, directly rejected the lower court's position here. Like this case, MAFLA involved a complaint as to "the absence of analysis of the effects of pipeline location and construction and the impact of pipeline leakage on particular areas." Id. at 823 (emphasis supplied). The Fifth Circuit, recognizing that the impact statement "include[d] a look at long-term effects of pipeline construction generally . . . and a special lease stipulation that reserves the right to require pipelines to be placed in designated areas or corridors" (just as the Sale No. 40 EIS does) Id., concluded that such discussions constitute "sufficient prestatement analysis of possible environmental hazards from pipeline location, construction or leakage." Id. at 824.^{16/} There is

^{16/} Of course the Sale No. 40 EIS also contains an exhaustive discussion of both the construction and operation of OCS pipelines as they might affect the coastal zone -- e.g. techniques for pipeline burial (II EIS 19); the dangers of pipeline accidents, as well as hazards that could pose a danger to pipeline integrity (II EIS 35, 37, 160, 161); the effects of pipeline laying, construction and operation, including the impact on local water quality (II EIS 95, 101-103), on biological communities (II EIS 104, 113, 114, 123, 126, 127, 129, 134, 136, 142, 145), fish (II EIS 149, 140, 193-98, 251), marine mammals (II EIS 153) and air quality (II EIS 165); onshore impacts of pipelines, including their effects upon archeological and historical sites (II EIS 206) land erosion, wetlands, and beaches (II EIS 285, 318, 323) transportation rights of way (II EIS 285) and wildlife (II EIS 330-33).

It is thus clear that the reader of the EIS was put on full and fair notice of all of the adverse environmental impacts associated with both pipeline construction and possible accidents resulting from pipeline operations, and Judge Weinstein has previously so held. Plaintiffs made a sustained attack throughout the July - August hearings on their motion for a preliminary injunction, which they did not renew during the January trial, on the alleged inadequacy of the discussion in the EIS and PEIS of pipeline construction and operations. See e.g., P.Tr. 24-26, 31-32, 42-45, 49-50, 91-92, 167, 498-503. Judge Weinstein in his August 13 order flatly rejected the plaintiffs' claims in this regard.

no justification here for departing from the principles of the MAFLA decision.

Neither Shell Oil nor anyone else undertook a site-specific study of likely pipeline corridors. Instead, Shell merely selected hypothetical or "example" routes (T.Tr. 864, JA 1738) to assess the economic, not environmental, feasibility of transporting OCS oil via pipeline as opposed to tankers. Since the lines drawn upon the chart utilized by Mr. Brunjes to illustrate the nature of his study could be moved 10-15 miles up or down the New Jersey coast without significantly affecting the Shell economic feasibility analysis (T.Tr. 1048-49, JA 1831-32), ^{17/} obviously the particular routes illustrated by the Shell study did not reflect planning by Shell or anyone else as to actual pipelines. Indeed, this point was conceded -- it was strongly urged -- by NRDC in its post-trial memorandum where it was argued that in the Shell pipeline economic feasibility study

"these two potential pipeline routes were picked only for their economic feasibility. Even the first glance shows they are unlikely to go where they were drawn on the map. . . ."
(NRDC Post-Trial Memo pp.9-10).

17/ See also Ex. T-4W; T. Tr. 855, 863-64 (JA 1729, 1737 -38) which illustrate that hypothetical Route I, via Ocean County, was estimated by Shell to involve transportation costs of 43¢ a barrel while Route Ia, via a landfall at the Atlantic-Cape May County border, costs were estimated 47¢, compared to tanker costs of \$1.16.

Judge Weinstein's misconception of the hypothetical routes set forth in the Brunjes exhibit is further revealed by his condemnation of Interior for not being "at least as conscientious as Shell Oil" in "consider[ing] the route into Delaware Bay and up the Delaware River to Philadelphia." Judge Weinstein claims this route was "studied by Mr. Brunjes and considered a feasible and likely corridor." (Dec. 33-34, JA 55-56). The fact is, however, as Mr. Brunjes clearly and explicitly testified, the Delaware Bay-Delaware River route was not used by Shell Oil even for its general economic feasibility study; instead, that route was dictated immediately prior to trial by defense counsel simply to give Mr. Brunjes another hypothetical route upon which to calculate the costs that would be required to pipeline oil to shore. (T.Tr. 858-59, JA 1732-33)..^{18/}

In other words, the Brunjes testimony was designed to do no more than demonstrate the range of costs of pipelining oil depending upon various arbitrary assumptions, ranging from the use of a straight line across the New Jersey Atlantic Beaches to a

^{18/} Other portions of the Brunjes testimony which Judge Weinstein quoted in his opinion (Dec. 31-32, JA 53 - 54) on their face reflect the fact that the Shell study simply made assumptions concerning the kinds of data that ultimately would have to be obtained to define pipeline corridors, such as production rates, the life of the field, the quality of the oil, its pumpability, capacity of particular refineries to process it, the availability of over-land right-of-ways, etc. While tolerable in an economic feasibility study to determine whether within a broad spectrum of possible routes pipelines would be feasible, the necessity of making these assumptions, in and of itself, demonstrates the impossibility of any present prediction of the actual pipeline corridors.

route that would totally avoid any New Jersey wetlands, including those inside Delaware Bay. That testimony demonstrated, as it was intended to, that pipelines over just about any conceivable route into New Jersey should be economically feasible because of the significantly greater costs involved in tankering oil. It was not intended to, nor did it, illustrate a point of view on either Shell Oil, plaintiffs or defense counsel, or anyone else that certain specific pipeline corridors were more likely than others.

C. The Coastal Zone Management Act
Further Demonstrates Judge
Weinstein's Error In Demanding
That the EIS Define Specific
Pipeline Corridors

Although the lower court dismissed the relevance of the CZMA (16 U.S.C. § 1451 et seq) to this case in a scant page and a half discussion (Dec. 13-14, JA 35-36)^{19/} that statute, in fact, represents a focused effort by Congress to deal with the very issue about which Judge Weinstein expressed his principal concern -- federal-state-local relationships with respect to federal programs, and most importantly the OCS leasing program, which impact the coastal zone. The basic scheme of the CZMA as initially enacted in 1972 is simple -- (1) federal funds are

^{19/} The three reasons recited by Judge Weinstein for his disregard of a CZMA will not withstand even the most casual scrutiny. First, it has never been suggested that NEPA must be applied without regard to the impact that other federal statutes have upon the shape of federal programs. Second, the fact that CZMA programs will not be completed until 1978 does not mean that they will not be in effect prior to the establishment of pipeline corridors, since, as Judge Weinstein previously found (Order 76, JA 231), pipelines from the Sale No. 40 area will not be laid until 1979 at the earliest. Third, each of the essential provisions of the CZMA relied upon by the defendants here have been in the Act since 1972.

disbursed to the States to encourage their development of CZMA programs (CZMA § 305); (2) those programs must inter alia, create a single decision-making apparatus within the State for implementing the State's coastal zone policy which will define areas appropriate for coastal facilities, such as pipelines (CZMA §306(c)(2 & 8)); (3) the state CZMA program is then submitted to the Secretary of Commerce who must review it to determine whether it meets the standards set forth in the federal statute prior to approving it (CZMA §306(c)); and (4) following such program approval, federal licensees or permittees must certify the consistency of their activities with the state's program (CZMA §307(c)).^{20/} Thus, under the CZMA both as originally enacted in 1972 and as amended in 1976, OCS pipelines, which require a federal license or permit, will be allowed to land only in areas authorized by the state's program.

New Jersey and the other states potentially affected by Sale No. 40 will soon have CZMA programs. As Judge Weinstein recognized in his prior order, "The states concerned with Sale No. 40 leasing have made substantial efforts to carry out the Management Act's purposes. They are in the advanced stages of the work." (Order 38, JA 194). The evidence taken at trial further confirms this finding. See, e.g. T.Tr. 106, 112-13, 121-24, 327-29, 557-64

^{20/} Any disputes between a state and a federal licensee as to such consistency are subject to mediation by the Secretary of Commerce (CZMA §307(c)). Ultimately, he can override a state's objections to proposed licensee activity if he finds that such an activity is consistent with the purposes of the CZMA or is otherwise necessary in the interest of national security (Id.).

566-67, 600-02; Ex. 224, p.ii (JA 2779), indicating New Jersey's view as of October, 1976 that it would submit its CZMA program for federal approval in 1977. This undisputed fact has enormous implications for the land-use regulation/pipeline location issue.

CZMA programs do not yet, but soon will, define pipeline corridors which New Jersey or other states find acceptable. That being so, it was not unreasonable for the EIS to await, as it said it would (II EIS 516-19), articulation of state policy with respect to location of pipeline corridors before identifying pipeline corridors. Indeed, compliance with the demand that Interior act at the EIS stage of Sale No. 40 to assert federal authority to define pipeline corridors, even assuming contrary to the record that it could do so (see pp 21-23, supra), would be inconsistent with the purposes of the CZMA and the federal-state comity it was designed to foster.

The very evidence upon which the lower court relied in faulting the EIS in this area demonstrated its error. At pages 11-12 of his decision (JA 33 - 34), Judge Weinstein quotes a criticism of New Jersey's Governor that the draft EIS "and its accompanying technical papers" (e.g. Technical Paper 1, Ex. No. 19) identified certain locations as possible sites for onshore facilities and thus assumed that these areas "may be sites for onshore operations bases or pipeline terminals." The Governor went on to criticize the draft EIS for making these assumptions "without adequate consultation with State or local officials now engaged in developing a Coastal Zone Management Strategy and Program pursuant to state and federal law."

While quoting and purportedly relying upon the Governor's testimony, Judge Weinstein completely misunderstood the obvious significance of what the Governor was saying. He was condemning Interior for specifying landfalls for pipelines and was urging that the matter be left open for future decision after New Jersey's CZMA program was complete.

Any doubt as to the Governor's meaning, and frankly we do not see how there could be any, is removed by the CZMA-motivated "Interim Land Use and Density Guidelines of the Coastal Area of New Jersey," (Ex. 225, JA 2938), which was published by New Jersey after the Governor's testimony, but before publication of the final EIS, and which clearly recognizes the prematurity of any present delineation of OCS pipeline corridors:

"Numerous kinds of [coastal zone] facilities are under some form of consideration: . . . support complexes for Outer Continental Shelf oil and gas exploration; pipelines to carry any OCS finds to refineries and processing plants in the Newark and Camden areas; Given the nature of the issues and that state of knowledge, the Department believes that formulation and dissemination of detailed site selection and performance guidelines would be premature at this time. Indeed, the formulation of such guidelines is to be a priority matter in the preparation of the overall Coastal Area management strategy." (p.21; JA 2949; emphasis added).

In response to the comments of New Jersey and local officials^{21/} the final EIS departed from the position of the earlier technical paper, which had identified particular counties where pipelines would probably be brought ashore. Instead, it stated "pipelines . . . will be undertaken . . . well after coastal zone plans have been implemented" (II EIS 516) and their "siting . . . will be a function of how this [facilities] control is delegated under the evolving coastal zone management plans and the existing or proposed State regulations." (II EIS 518).

21/ The Cape May County planning official, who testified for Plaintiffs at trial, specifically addressed the issue of pipeline corridor planning in his administrative hearing testimony:

"The proposed lease stipulation regarding designated pipeline corridors [i.e. that lessees be forced to lay pipelines in corridors to be designated in the future] should be written to provide for consistency of the BLM Plan and the effected State Coastal Zone Management Plan and any adopted regional plan designating pipeline corridors. Onshore support and processing facilities should also comply with these plans." (Ex. T-4K p.95, JA 2818).

He testified at the preliminary injunction hearing (P.Tr.1594-95, JA 900-01) and again at trial (T.Tr. 112, JA 1246) that the EIS's position on future studies for pipeline corridors was responsive to Cape May's comments.

See also III EIS 32 where in responding to a criticism made about the draft EIS by the federal EPA, which had commented that Interior should not operate on the premise that it could use the shortest and cheapest pipeline route to land oil and gas from the Sale 40 region, the final EIS specifically recognized that, since State and local jurisdiction have permitting powers over the laying of pipelines onshore and in state waters, they can control the areas where pipelines would be allowed.

Clearly, the EIS took precisely the position which the State of New Jersey and local governments urged upon it in connection with pipeline corridors. Thus, Judge Weinstein struck down the EIS, allegedly for ignoring state and local decision-makers in this area, but in fact for adopting the position urged by them.

7. The EIS Sets Forth a Comprehensive Discussion of Mid-Atlantic State and Local Jurisdiction Over Land-Use as it Pertains to OCS Facilities

By our count, Vols. I and II of the EIS alone contain 60 pages of discussion of state and local land-use regulation as it affects the placement of onshore OCS facilities.^{22/} (The Court

22/ The EIS contains a detailed analysis of specific state regulatory programs pertaining to the coastal zone (I EIS 39-49, 50-52); regulatory devices employed by the Mid-Atlantic States to allow local jurisdictions to exercise their authority over the coastal zone (I EIS 58-61); land-use impacts of OCS operations, including an extensive discussion of state and local land-use controls, the philosophies which often underlie them, and actual experience, as well as possible future scenarios, for their implementation (II EIS 266-91); the present status of each of the Mid-Atlantic States CZMA programs under federal legislation and under existing state legislation, (II EIS 426-30, 516-19); Mid-Atlantic State programs requiring permits for the discharge of oil and creating fines and/or liabilities in the event of accidental discharges or spills (II EIS 434, 437-38); the types of on-shore facilities that will be utilized in the Mid-Atlantic area and the existing federal, state, and local schemes affecting these facilities, and the procedures contemplated for State participation in subsequent OCS development decisions. (II EIS 584-90).

is respectfully referred to pp.24-36 of NOIA's brief, dated September 10, 1976, in No. 76-6122, for a more complete discussion of these sections of the EIS). Thus, the lower court agreed that the EIS did contain "numerous references" to state and local land-use regulatory authority (Dec. 15, JA 37). Patently, these "numerous references" in the EIS to state and local regulatory mechanisms give an objective reader of the EIS a clear overview of the nature, and indeed precise identity, of various state land-use controls and set forth on a state-by-state basis the relationship of local and state decision-making in this area.

Of course, as a theoretical matter, more could have been said about this subject. The drafters of the EIS could have sought to collect more information about the existing powers of specific Mid-Atlantic towns and counties, and Judge Weinstein's invalidation of the EIS may rest in part upon the absence of this kind of detailed information (Dec. 11, JA 33). But as Judge Weinstein himself held

"there are hundreds of political subdivisions with varying degrees of jurisdiction over various aspects of Sale 40 related developments." (Dec. 9, JA 31).23/

23/ See also Dec. 10-11 (JA 32-33):

"When the six states and many cities and other municipalities bordering the estuaries, bays, sound and ocean are considered, the number of authorities with power to effect [Sale No. 40] operation[s] multiplies into the hundreds."

To require the drafters of the EIS actually to collect, list, and analyze each of the ordinances, regulations, etc., of these local governments would have been a useless, time-consuming exercise plainly not required by NEPA. In testimony offered by both county and municipal officials, it was repeatedly made clear that the local land-use authority of at least the New Jersey communities put forward by plaintiffs as a "representative sampling" of Mid-Atlantic jurisdictions was like that of most other places; it simply zones for particular uses and sets up variance procedures to allow for other uses. (T.Tr. 99 re Cape May County; T.Tr. 153-54 re Cape May City; T.Tr. 170-71, 184 re City of Wildwood). The EIS, of course, recognized the general nature of such local zoning regulations (see e.g. II EIS 279-91). No purpose would have been served by actually listing the precise town or county zoning regulations embodying this general form of regulation.

E. The EIS Adequately Sets Forth
Public Attitudes Toward On-Shore
OCS Facilities.

The reader of the lower court's February 17 opinion who failed to consult the EIS itself would be left with the impression that the EIS did no more than list statutes indicating the existence of state and local regulatory authority and offered nothing in the way of guidance as to the manner in which those authorities might be utilized to effect the OCS program. This just is not so.

While Judge Weinstein complained that the EIS was "abstract" because he thought it did not carry analysis to the point of discussing the impacts of state-local regulation upon Sale No. 40 (Dec. 19, JA 41), the fact is the EIS dealt extensively with such impacts. As this Court held in its October 14 decision, the EIS and PEIS

"contain numerous references to the possible lack of state cooperation relative to pipeline location and usage and the alternative use of tankers."

Indeed, the drafters of the EIS were sufficiently concerned about the possible lack of "receptivity of State and local jurisdictions along [the] Mid-Atlantic coast to the approval of pipeline landfalls that would be needed" (II EIS 20) that they discussed at length the impacts associated with tankering oil to shore, should pipelines be vetoed. See II EIS 30-32, where the increased likelihood of oil spillage "if [pipeline] rights-of-way are denied in State waters" (II EIS 30) is quantified and where the EIS goes on to discuss such issues as tanker size, registry, regulatory requirements, etc., (II EIS 32), all on the hypothesis that the impact of local land-use regulation might be such as to bar pipelines. Moreover, there are at least seven other places in the EIS where the possibility of tankering, rather than pipelining oil to shore is discussed. (I EIS 15; II EIS 10, 17, 169, 509; III EIS 18, 46).

In addition to this lengthy analysis, a 269-page section of Volume III set out a verbatim recitation of the comments made by many public agencies reflecting their attitudes towards Sale No. 40.^{24/} Then, in a 60-page section of Volume III, the EIS distilled 65 different issues raised by these comments, indicating the identity of the commentator(s) giving rise to the issue and setting forth a succinct response to it. (III EIS 15-75). A perusal of this section reveals a response by Interior to every meaningful issue raised by political jurisdictions or others in connection with Sale No. 40.^{25/} The comments reproduced in the EIS, as well as Interior's responses to them, are fully incorporated in the EIS and should be taken into account in passing upon its adequacy. National Helium Corporation v. Morton, 486 F.2d 995, 1003 (10th Cir. 1973), cert. denied, 416 U.S. 993 (1974).

To Judge Weinstein, however, this discussion of public attitude toward Sale No. 40 was not enough. He demanded that the EIS speculate about future enforcement attitudes of state and local governments. In so doing, once again he pushed NEPA beyond its intended bounds.

24/ See III EIS 182-239, New York; III EIS 241-74, New Jersey; III EIS 275-92, Delaware; III EIS 293-316, Maryland; III EIS 317-26, Virginia; III EIS 350-53, Monmouth County, N.J. Environmental Council; III EIS 366-79, Middlesex County, N.J. Planning Board; III EIS 444-49, Long Island, N.Y. Environmental Council.

25/ See III EIS 18 re effect of pipeline transportation of OCS oil on tanker traffic; III EIS 24 re alleged inadequacies in discussion of on-shore impacts of Sale No. 40 activities; III EIS 25 re alleged inadequacies concerning the specific locations where impacts occur; III EIS 26 re allegedly excessive focus by the EIS on four New Jersey counties as locations for major on-shore OCS facilities; III EIS 27 re alleged excessive focus by the EIS on land demands, infrastructure to support OCS development. See also III EIS 28,30,32,36,37,41,44,45,52,58, 61,62-63,64, re many, many other issues touching upon the on-shore impacts of OCS Sale No. 40.

As the D.C. Circuit recognized in NRDC v. Morton, supra, 458 F.2d 838, NEPA "was not meant to require detailed discussion of the environmental effects" of matters

"deemed only remote and speculative possibilities, in view of basic changes required in statutes and policies of other agencies."

That Judge Weinstein faulted the EIS for not speculating about "basic changes required in . . . [the] policies of other agencies" is made clear by the undisputed fact that in the comments made in the extensive administrative proceedings before Sale No. 40 there were no threats by any state or local government that it would veto OCS onshore facilities. Instead, consistent with its present position,^{26/} New Jersey indicated it was planning on allowing oil to be transported via pipelines to onshore facilities at appropriate locations. Thus, in its comments New Jersey praised the EIS for insisting

^{26/} See Ex. T-224 (JA 2776) "Alternatives for the Coast," Oct. 1976, which sets forth the latest statement of New Jersey's perspective on coastal zone planning and regulation. This report makes it clear that New Jersey's present attitude with respect to pipeline placement is positive -- anticipating that pipelines will land in New Jersey. Thus, in specifically addressing OCS development, the Report states that "the central issue is how to accommodate OCS related industry and facilities without degrading the . . . environment," (Id. at 62, JA 2730, emphasis supplied), without any suggestion that the State intends to exclude or bar those facilities. Thereafter, various policy alternatives are set forth -- including the suggestion that

"OCS resources could be brought ashore by pipeline, along right-of-way to be established by the Department of the Interior and the State." (Id. at 63, JA 2731).

that pipelines be placed in Interior-designated corridors (III EIS 242) and cautioned only that care must be taken in the future when locating those corridors. (III EIS 242, 258). Delaware, the only other state where pipelines might land, was utterly silent on this issue. (III EIS 275-92).

Just as the States in their comments upon the draft EIS failed to indicate the hostility which Judge Weinstein speculates they one day will feel for Sale No. 40, so too the local and county officials who offered written or oral testimony at the administrative hearings similarly failed to raise the specter of a state/local-federal confrontation. Thus, for example, Mr. Worthington, County Executive of Atlantic County, New Jersey (where Atlantic City is located) testified:

" . . . I take it that although you would be opposed to pipelines coming ashore in the County in certain specific areas and you enumerated those areas, that you would not necessarily be opposed to pipelines coming ashore in other areas under appropriate regulations?"

MR. WORTHINGTON: That's correct . . ."
(Ex. T-4L, p. 42, JA 2704) 27/

Even the handful of New Jersey local officials who testified for plaintiffs at trial failed to inform

27/ See also the testimony of Joseph Bradway, the Mayor of Atlantic City (Ex. T-40, pp. 128-29, JA 2710-11), and the New Jersey State Beach Erosion Control Commission, which testified pipelines could be brought ashore in New Jersey under appropriate circumstances with proper regulation. (Ex. T-4H, p. 57, JA 2694).

Interior at the administrative hearings that the localities which they represented would veto pipelines or other OCS facilities. Cape May County took the position at the administrative hearings that pipelines should be mandated, not that Cape May County would oppose pipelines from the Sale No. 40 area (T.Tr. 112, JA 1246). Wildwood, New Jersey stated only that a federal or state compensation scheme should be enacted to indemnify members of that community against oil spill damages (T.Tr.187-88,JA 1309-10).

Patently, in the light of the evidence at trial and of the positions taken in the administrative proceedings, Interior fully satisfied NEPA with respect to the pipeline-corridor, land-use regulation issue.

II. JUDGE WEINSTEIN ERRED IN HIS ANALYSIS
OF THE EIS'S DISCUSSION OF ALTERNATIVES

A. Judge Weinstein Erred In Finding
That The Alternative Of Separating
Exploration and Production Had Not
Been Adequately Considered

Judge Weinstein determined that the EIS and PEIS inadequately addressed the "alternative" of amending the OCS Lands Act (43 U.S.C. §1331 et seq) or undertaking internal policy changes necessary to permit a separation of exploration and production, in lieu of the existing practice mandated by that

Act of issuing "unitary" leases for both exploration and development.^{28/} In so holding, Judge Weinstein resurrected an argument, which had been vigorously advocated by plaintiffs during the preliminary injunction phase of this case, but which he had specifically rejected at that time. For in the August 13 order he specifically focused on the plaintiffs' argument that

"a reasonable Secretary might well have concluded not to lease now for production, but to conduct further studies, and explorations before permitting exploitation,"

when reaching his conclusion that the EIS generally met

"both the spirit and letter of NEPA requirements." (Order 30-31, JA 185- 186, emphasis supplied).

In reversing himself on this point, Judge Weinstein relied principally upon the testimony of a staff employee of the New York BLM Office as to that office's pre-EIS procedures -- the only new evidence in the case on this issue -- and to a lesser extent on his own analysis of the EIS and PEIS--which, of course,

28/ Section 1337(b) of the OCS Lands Act, 43 U.S.C. § 1337(b), provides:

"An oil and gas lease issued by the Secretary pursuant to this Section, shall . . . (2) be for a period of five (5) years and as long thereafter as oil and gas may be produced from the area in paying quantities" (emphasis supplied)

That the Act thus mandates that all OCS leases issued under existing law shall be for both exploration and production has been consistently recognized by Interior -- See e.g. Ex.6, p.36 - "separation of exploration and development . . . is not possible under current legislative authority" -- and all prior relevant judicial constructions of the Act -- See, *Alaska v. Kleppe*, supra, 9 ERC at 1502. See also, *Gulf Oil Corp. v. Morton*, 493 F.2d 141 (9th Cir. 1973); *Union Oil Co. v. Morton*, 512 F.2d 743 (9th Cir.1975).

were before him during the preliminary injunction phase of this case. In both respects, Judge Weinstein erred.

1. Judge Weinstein Improperly Relied Upon Testimony Concerning the New York BLM Office's Consideration of the Separation of Exploration and Production.

Judge Weinstein held that:

"The government never considered exploration to determine the extent of oil and gas reserves and their location before granting exclusive rights of production." (Dec. 58, JA 81).

The sole evidentiary basis for this finding was the "trial testimony [of] the government's witness, Judith Gresham," who Judge Weinstein characterized as stating that "no alternative had ever been considered by the New York City office of the Bureau of Land Management in preparing for Sale No. 40," citing T.Tr. 768-69 (Dec. 58-59, JA 81-82). This finding misconceives both the evidence and the law bearing upon Ms. Gresham's testimony.

Ms. Gresham's testimony focused solely upon the so-called tract-selection phase of Sale No. 40. As she repeatedly explained (and as the lower court seemed to understand in its August 13 order (Order 24-25, JA 179-180)), this phase of an OCS sale represents merely the initial efforts by Interior field personnel to identify those tracts which will be the subject of subsequent environmental scrutiny in the EIS:

- "Q. In other words the process we are talking about now is the reduction of this nominated area down to the tracts which were actually selected to be offered for sale?

A. No, down to the tracts that were to be selected to be studied in the impact statement. It ended up being the same number, but that wasn't our intention at the time.

Q. It would have been possible the tracts could have been eliminated --

A. At any time.

Q. Even after the EIS process if it had been deemed appropriate?

A. Right." (T.Tr. 721, JA 1652. See also, T.Tr. 755-57, JA 1686-88).

As the Court can see from its own inspection of Ms. Gresham's testimony (T.Tr. 711-70, JA 1641-1701), she never described decision-making by Interior after the preparation of the EIS, but instead referred solely to the pre-EIS, tract-selection phase of Sale No. 40.

As Ms. Gresham's testimony also makes clear, various policy-oriented comments which were made at the time of the tract-selection process--such as the demand that there be a separation of exploration and production (T.Tr. 744, JA 1675)--were not "tract-specific" in that they had nothing to do with her function of identifying particular tracts for EIS scrutiny. (T.Tr. 747, JA 1678).^{29/} Indeed, at trial Judge Weinstein apparently appreciated the limited role played by Ms. Gresham, particularly with respect to the consideration of the alternative of separating exploration and production, since he sustained the Government's objection to the court's own line of inquiry on this question:

^{29/} Moreover, when comments on the tracts to be selected for EIS scrutiny were "tract-specific," Ms. Gresham and others in the New York BLM office carefully considered those comments. (T.Tr. 737-39, JA 1668-70).

"MR. HYMAN: . . . [T]he EIS covers exploration, separation, production and all these things that come up. This lady over here is just concerned with one item, I think. I don't think it's fair to ask her that kind of question. As I said when we first started this case, your Honor, it is in the EIS.

THE COURT: Yes, I know. I know it's in the EIS. But I want to know what was in the mind of the people that were making the decisions here.

MR. HYMAN: She didn't make -- she isn't ultimately the one responsible to make the decision.

THE COURT: I understand. But the work that is done by important people at a field level and other levels up to the Secretary can't be ignored.

MR. HYMAN: That's right.

THE COURT: If they are operating under an assumption which is right or wrong -- that is, what is being done here -- and whatever is in the EIS --

MR. HYMAN: That's correct, your Honor. But the point is, when you ask her a question like that -- she's not a lawyer -- about separation and production from exploration.

THE COURT: You object to the question?

MR. HYMAN: Yes, your Honor.

THE COURT: Objection sustained." (T.Tr. 769-70, JA 1700-01)

The lower court should have abided by its ruling upon this objection to the questioning of Ms. Gresham. Plainly, her testimony pertained only to the pre-EIS tract-selection process. Thus, to rely upon it to establish that "the Government never considered [the alternative of] exploration . . . before granting exclusive rights of production" necessarily turns upon the assumption that consideration of alternatives must occur before the preparation of the EIS itself. This position seriously misconceives, indeed it simply ignores, direct

legal precedents excusing pre-EIS environmental analysis, which were called to Judge Weinstein's attention in the post-trial submissions of defendants. Aberdeen & Rockfish Railroad Co. v. SCRAP (SCRAP II), 422 U.S. 289 (1975); California v. Morton, 404 F.Supp. 26 (C.D. Cal. 1975), on appeal, 9th Cir., 76-1431.

In SCRAP II, the Supreme Court squarely rejected the view of the lower court (371 F.Supp. at 1300), that NEPA "would seem to demand that environmental issues be considered at every important stage in the decision making process . . .", not just at the post-EIS stage of final decision:

"NEPA provides that 'such statement . . . shall accompany the proposal through the existing agency review processes' (emphasis added). This sentence does not, contrary to the District Court opinion, affect the time when the 'statement' must be prepared Under this sentence of the statute, the time at which the agency must prepare the final 'statement' is the time at which it makes a recommendation or report on a proposal for federal action." 422 U.S. at 320. 30/

California v. Morton, supra, applied SCRAP II in the context of an OCS lease sale to reject the very position taken by Judge Weinstein here. There, plaintiffs sought an injunction on the ground, inter alia, that NEPA required impact statement-like scrutiny of the project when Interior identified any part of the OCS as a possible target for a future lease sale -- i.e., at the tract-selection stage. Citing SCRAP II, the court rejected this argument:

"the inviting of nominations of acreages from industry were necessary preliminary activities possibly leading to a lease sale but which did not have to be preceded by an impact study of the type required by § 102." 404 F. Supp. at 31.

30/ The Supreme Court reaffirmed and even strengthened SCRAP II last term in Kleppe v. Sierra Club, supra, 427 U.S. at 405-06.

Thus, as SCRAP II and California v. Morton make clear, the attitudes and actions of the New York OCS office in conducting the tract-selection process prior to the preparation of an EIS simply have no bearing on whether Interior met its responsibilities to consider alternatives to the proposed action. As we will now show, these alternatives were fully discussed in the EIS for Sale No. 40 and the PEIS for the accelerated leasing program. That fact, not the testimony of Ms. Gresham, demonstrates that Interior met its NEPA responsibilities to consider alternatives to the proposed action.

2. The Impact Statements Adequately
Discuss the Separation of Explora-
tion and Production.

The lower court was right the first time, when in the August 13, 1976, order, it refused to enjoin Sale No. 40 on this point. The "Alternatives" section of the EIS deals with the possibility of government exploratory drilling prior to leasing. The EIS notes possible advantages of such a program, as well as distinct disadvantages -- the "procedure could delay leasing for several years just to evaluate the data, further increasing Mid-Atlantic reliance on foreign supplies of oil and gas during that period." (II EIS 582-83).

The PEIS addresses the possibility of separate exploration and production at length, reviewing every form of separating the two phases. (II PEIS 350-56). Thus, it discusses the possibility of "Special Limited Leasing" prior to full-scale leasing in frontier areas (II PEIS 353); of "Leases for Exploration Only" (II PEIS 353-54); of a "Federal

Exploratory Drilling Program" (II PEIS 354-55); of "Federally Conducted Off-Structure Stratigraphic Drilling" (II PEIS 355); and of "Privately Conducted" off-structure drilling (II PEIS 355-56), even though these alternatives would require an amendment to the OCS Lands Act or at least appropriations for new federal activities.

Directly applicable precedents demonstrate the adequacy of this discussion. Thus, in Sierra Club v. Morton (MAFLA), supra, 510 F.2d 813, there was no discussion of exploration before leasing by means of federal exploration, yet the Fifth Circuit upheld the EIS:

"Plaintiffs are critical of the statement's failure to discuss federal exploration. We reject this criticism. The court below correctly observed: '[t]he short answer to plaintiffs' argument is that federal exploration is not an alternative to the project, but merely another means of proceeding with the project so that the environmental consequences should be substantially the same in either case.' We agree that federal exploration would present substantially the same environmental hazards as permitting private developers to explore the tracts sold." 510 F.2d at 825 (emphasis in original).

Judge Weinstein attached no significance to the fact that the "alternative" of separating exploration and production would have no significant effect on the environmental impacts to be anticipated from operations in the Mid-Atlantic OCS area. Putting aside the fact that the MAFLA case -- which was decided before the EIS was published -- wholly excused Interior from discussing such an issue in an impact statement for an OCS sale, it

would seem, at the very least, that an evaluation of the adequacy of the discussion of this alternative should take this fact into account.

Moreover, the lower court recognized that the implementation of this alternative would require a change in governmental policy; indeed, a change in the statutory authority granted the Secretary under the OCS Lands Act would be needed for the use of exploration-only leases. Nonetheless, Judge Weinstein simply cited NRDC v. Morton, supra, 458 F.2d 827, for the proposition that even alternatives which require statutory changes must be discussed in an impact statement in the same detail as alternatives well within the bounds of an agency's authority. But NRDC v. Morton, itself illustrates the error in this approach to NEPA. As the court held, although the "mere fact that an alternative requires legislative implementation does not automatically establish it as beyond the domain of what is required for discussion,"

"there is reason for concluding that NEPA was not meant to require detailed discussion of the environmental effects of 'alternatives' . . . when . . . the alternatives are deemed only remote and speculative possibilities in view of basic changes required in statutes . . ." 458 F.2d at 837-38 (emphasis supplied).

Given the extensive discussion in the EIS and PEIS of the separation issue, Judge Weinstein obviously ignored the principles of the very case upon which his opinion purportedly rests when he invalidated the EIS with respect to this issue.

Finally, it appears that Judge Weinstein's real complaint about the EIS and the PEIS turned upon his dissatisfaction with the decision made by Interior not to seek legislation that would have allowed it to select the alternative of separating exploration and production. What other explanation is there for his reference to what he termed the "noteworthy" fact that the Secretary opposed legislation which would have provided for such separation (Dec. 66, JA 89) or his statement that a rejection of federal exploratory drilling because of budgetary constraints is "incredible when it comes from spokesmen of the most powerful government in the world" (Dec. 64, JA 89)?

But NEPA does not empower a federal judge to rest decision on the basis of his substantive disagreement with the agency's judgment in not choosing a particular alternative. "When [NEPA] courts can say that such a judgment has been made, their mission is at an end." Silva v. Lynn, 482 F.2d 1282, 1287 (1st Cir. 1973) (footnote omitted). See also Scenic Hudson Pres. Conf. v. FPC, 453 F.2d 463, 481 (2d. Cir. 1971), cert. denied, 407 U.S. 926 (1972).

B. Judge Weinstein Erred In Finding
That Interior Had Not Considered
The Onshore Impacts Of Choosing
Particular Tracts.

In a brief section of his opinion (Dec. 71-74, JA 94-97), Judge Weinstein held that the EIS was inadequate because to him, it was

"clear from the record that nowhere in the lengthy process of considering which tracts were ultimately to be leased did the Secretary or the Bureau of Land Management personnel charged with preparing NEPA documents consider the onshore impacts of choosing particular tracts, rather than others." (Dec. 72, JA 95).

This finding, like the finding on the separation issue, was based on the testimony of Ms. Gresham with respect to the role which she played in the pre-EIS tract-selection phase. See Dec. 73-74 (JA 96 - 97). Thus, for the reasons recited above with respect to the court's erroneous reliance upon her testimony on that issue, it is clear that Judge Weinstein wrongfully relied upon her testimony with respect to the consideration of onshore impacts of Sale No. 40.

In addition to the lower court's error in relying upon Ms. Gresham's testimony with respect to this issue, which in and of itself is a basis for reversing his finding on this issue, there are two other answers to this point. First, the "onshore impact of choosing [the] particular tracts" actually leased in Sale No. 40 was carefully considered in the EIS itself. Indeed, the lower court so held when it squarely rejected the argument, advanced by appellee NRDC in the July-August preliminary injunction hearings as its primary contention, that the EIS was inadequate in this connection:

"The EIS with its preliminaries, hearings, and conferences engaged the attention of a substantial portion of the relevant scientific community. The state and local political entities most affected were advised of the plans, their implications, and their dangers. . . In short, the process worked well to insure that the possible consequences of this major action in opening areas off our most populated coast to oil and gas production was fully debated, open to political veto, and considered in depth by the Secretary and his staff as well as other units of government." (Order 31-32, JA 106-107).

Second, the EIS considers at length the alternative of holding "the proposed sale in modified form" by both "delet[ing] tracts from the proposal" (II EIS 502-510) and by "substitut[ing] tracts within the call for nominations area" (II EIS 510-516). In these sections of the EIS virtually ever conceivable pattern of conducting a Mid-Atlantic sale is discussed -- ranging from a much smaller version of Sale No. 40 in the area where it actually was held, to an easterly extension of the sale along the continental slope, to a nearshore sale much closer to the Mid-Atlantic coast. Thus, plainly the EIS dealt extensively with both the onshore impacts of the tracts actually offered for sale and with the possibility of restructuring the sale to offer tracts other than those which were ultimately sold.

III. JUDGE WEINSTEIN ERRED IN STRIKING DOWN
SALE NO. 40 ON THE BASIS OF HIS DE NOVO
ASSESSMENT OF THE INVESTMENT COSTS AND
PRODUCTION RATES ASSOCIATED WITH THE SALE

The suspicion voiced in Part II A above that Judge Weinstein invalidated Sale No. 40 because of his substantive review

of and disagreement with Interior ripens into certainty when attention is turned to the lengthy section of his opinion (Dec. 43-58, JA 65-81) purportedly undertaking a NEPA analysis of the weighing of the costs and benefits associated with Sale No. 40. There, he adopts -- indeed, he simply quotes at length -- the direct testimony of a private consultant for plaintiffs who concluded that Interior's decisional documents, not the EIS, understated the investment costs associated with exploration and development of the Sale No. 40 area and overstated the peak production rates, not amounts, of oil and gas which might ultimately be anticipated in the Sale No. 40 region.

The most vivid illustration of the nature of Judge Weinstein's findings on this issue pertains to his determination that the PDOD had significantly understated pipeline construction costs. For while relying solely upon the general testimony of the consultant on this point, he simply ignored the testimony of Mr. Brunjes (the Shell Oil pipeline planning engineer who had done a specific pipeline economic feasibility study for the Sale No. 40 area) that the pipeline cost figures used by Shell were very close to the figures subsequently used by the Secretary in making the Sale No. 40 decision. (T.Tr. 1062-64).^{31/}

In short, under the rubric of a cost-benefit analysis, Judge Weinstein (a) engaged in a substantive review of the Sale No. 40 decision by (b) taking evidence de novo focusing on the internal decision-making documents underlying Sale No. 40, and (c) crediting that evidence without acknowledging other

^{31/} In another context, Judge Weinstein credited Mr. Brunjes' testimony "in full" because he was "impressed by [his] skill and honesty." (Dec. 42, JA 64).

conflicting evidence in the record.

A. Judge Weinstein Indulged in Substantive
Review of the Sale No. 40 Decision That
Is Not Permitted by NEPA

We note at the outset Judge Weinstein's confusion in tendering an analysis to support his reassessment of the Secretary's decision to go forward with Sale No. 40:

"While we find it unnecessary to consider plaintiffs' submission that NEPA requires substantive review of the administrative decision, and no such review has been undertaken in this case, there is no disagreement that, at a minimum, the Secretary's decision may not be arbitrary and capricious." (Dec. 57-57A, JA 79 - 80).

But of course, to the extent courts have actually contemplated the possibility of substantive review in NEPA litigation (and we will next show such review is not appropriate) they have done so under precisely the standard that the "decision may not be arbitrary and capricious." See e.g., EDF v. Corps of Engineers, 470 F.2d 289, 300 (8th Cir. 1973), cert. denied, 412 U.S. 931 (1973).

In any event, it is clear that Judge Weinstein's quarrel with the economics of the Sale No. 40 project lies outside the parameters of a court's proper concern in a NEPA action. As the Supreme Court held in its most recent NEPA decision

"the only role for a court [under NEPA] is to ensure that the agency has taken a 'hard look' at environmental consequences; it cannot 'interject itself within the area of discretion of the Executive as to the choice of the action to be taken.'" Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976).

This Court in Hanley v. Mitchell, 460 F.2d 640, 643 (1972), correctly anticipated the Supreme Court's position in Kleppe v. Sierra Club, when it held

"Plaintiffs properly disclaim any attempt to argue before us the merits of the proposed building project. They concede that the question on appeal is not whether the proposed buildings . . . should be built, but whether the requirements of the National Environmental Policy Act have been met." 32/

Clearly, Judge Weinstein's decision to strike down Sale No. 40 because of alleged errors by the Secretary with respect to the economics, not environmental impact, of Sale No. 40 does not constitute a "hard look at [the] environmental consequences" of the sale, as permitted under Kleppe v. Sierra Club, but instead represents a decision by him as to the "merits of the proposed . . . project" in the manner condemned by this Court in Hanley v. Mitchell.

B. Judge Weinstein Erred by Indulging in
De Novo Review of Decisional Documents

Even if, assuming arguendo, his substantive review of the Sale No. 40 decision was not improper, Judge Weinstein erred in his treatment of the evidence in arriving at the conclusion that Interior's decision was arbitrary and capricious. As appellants have consistently argued (see e.g. NOIA post-hearing memo dated August 10, 1976, pp. 30-31), the lower court had no warrant to

32/ See also City of New York v. United States, 344 F.Supp. 929, 940 (E.D.N.Y. 1972) (Friendly, C.J.).

look behind the EIS and to probe the Secretary's decision-making process. See Sierra Club v. Morton, (MAFLA), supra, 510 F.2d. at 829, where the Fifth Circuit clearly held that even assuming there is substantive NEPA review, it is limited to an examination of the EIS:

"In view of our determination that the procedural requirements of Section 102 [of NEPA] were satisfied, we look to whether the Secretary's decision, based upon information contained in the EIS, was arbitrary, capricious or an abuse of discretion." (emphasis supplied).

See also Chelsea Neighborhood Ass'n v. Postal Service, 516 F.2d 378, 389 (2d. Cir. 1975) (refusing to consider matters outside the EIS); Sierra Club v. Froehlke, 486 F.2d 946, 953 (7th Cir. 1973).

This rule for NEPA cases merely reflects fundamental principles of administrative law that bar examination of internal documents, like a PDOD, which summarize material in the public record and marshal arguments for and against a proposed action:

"To probe the summaries of record evidence would be the same as probing the decision-making process itself. To require disclosure of the summaries would result in publication of the evaluation and analysis of the multitudinous facts made by the Administrator's aides and in turn studied by him in making his decision. Whether he weighed the correct factors, whether his judgment scales were finely adjusted and delicately operative, disappointed litigants may not probe his deliberative process." Montrose Chemical Corp. v. Train 491 F.2d 63, 68 (D.C.Cir. 1974) (emphasis supplied). 33/

33/ Judge Weinstein purportedly recognized these principles when undertaking his sua sponte review of the good faith of the Secretary's OCS decision-making process (Dec. 82-83, JA 105-06), yet inexplicably ignored them when entertaining testimony concerning alleged errors in the PDOD.

See also National Nutritional Foods Association v. FDA, 491 F.2d 1141, 1145 (2d. Cir. 1974); Andrews v. Knowlton, 509 F.2d 898, 906-^{34/}07 (2d Cir. 1975).

Compounding the error in admitting the PDOD into evidence was the manner in which Judge Weinstein received and evaluated evidence concerning its accuracy. Both the Supreme Court and the courts of appeals have emphasised that review of agency action must be limited to the administrative record, not some new record made in court. In Camp v. Pitts, 411 U.S. 138 (1973), for example, which reversed an order to take evidence to determine if a decision was arbitrary and capricious, the Supreme Court held that:

"in applying that standard the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." Id. at 142.

See also, FPC v. Transcontinental Gas Pipeline Corp., 423 U.S. 326 (1976); Consolo v. FMC, 383 U.S. 607, 619 n. 17 (1966); Bradley v. Weinberger, 483 F.2d 410, 415 (1st Cir. 1973):

"Courts are to determine whether the agency's action was arbitrary or capricious in light of the information it confronted. It is a review, a second look at the same material, not a re-doing."

^{34/} Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971), is inapplicable here. In Overton Park, the Government was unable to offer any record of statutorily-mandated consideration of alternatives to the proposed federal action. For this reason, the Court permitted deposition testimony, production of internal documents and the like to reveal whether such alternatives had been considered. Here, in sharp contrast, the EIS sets forth at length on the public record, the discussion of the alternatives, environmental impacts, and all other matters concerning Sale No. 40 which NEPA requires be discussed.

C. Judge Weinstein Improperly Determined He Could Weigh The Evidence to Decide Whether Interior's Sale No. 40 Decision Was Arbitrary and Capricious.

Judge Weinstein's disregard of judicial review principles did not end with his receipt of de novo evidence. For under the guise of applying the "arbitrary and capricious" standard, he evaluated that evidence in a manner which indicated he thought he could weigh the evidence and draw whatever conclusions he wanted from it. But under the "arbitrary and capricious" standard a judge is not free to so weigh the evidence. An arbitrary decision is not one with which a district judge may disagree because of his perception of the evidence. Udall v. Washington, Virginia and Maryland Coach Company, 398 F.2d 765, 769 (D.C.Cir. 1968); Independent Meat-packers Ass'n v. Butz, 526 F.2d 228 (8th Cir. 1975). Rather, an arbitrary action "is one lacking in rational basis because there is no evidence upon which the decision may be logically based." Temple University v. Associated Hospital Service of Philadelphia, 361 F.Supp. 263, 271 (E.D.Pa. 1973) (emphasis supplied).

"[NEPA] did not, in our judgment, contemplate or anticipate that courts were to make choices and determine the merits of conflicting views between the two or more schools of scientific thought and to thereafter disapprove any final EIS which may rely upon data which was inconsistent with the court's finding." Environmental Defense Fund v. Froehlke, 368 F.Supp. 231, 240 (W.D.Mo. 1973), aff'd, 497 F.2d 1340 (8th Cir. 1974).

Judge Weinstein did not hold, for manifestly the record would not allow it, that the "expert" testimony upon which he relied to invalidate the Sale No. 40 decision itself was so uncontradicted or so compelling as to permit him to find that the decision was

incapable of being supported on a rational basis. Instead, Judge Weinstein resorted to a lesser, and plainly insufficient finding (which is similarly unsupported in the record), that the "expert" had identified inadequacies in the decision-making documents which were so crucial as to constitute "for NEPA purposes, a failure to make a meaningful inquiry" (Dec. 58, JA 80), a finding that falls far short of supporting Judge Weinstein's determination that the Sale No. 40 decision was arbitrary and capricious. In any event, even this ambiguous finding rests upon a patently erroneous analysis of the record below.

We have already referred to the evidence with respect to the pipeline-cost issue and have noted the fact that Mr. Brunjes demonstrated that the Shell Oil pipeline economic feasibility study for the Sale No. 40 area corresponded closely with the cost estimates used by Interior in the PDOD. Passing the question whether any objective trier of fact could have relied upon the consultant's testimony against that of Mr. Brunjes, it is clear that his testimony demonstrated more than an adequate basis for determining that Interior's pipeline costs figures could not be dismissed as arbitrary and capricious.

A like conclusion applies to the lower court's reliance upon the consultant's testimony as to the alleged understatement of the "finding costs" associated with exploration for new reserves in the Sale No. 40 region. The consultant admitted that he had simply equated the estimated "investment costs" referred to in the PDOD with "finding costs" contained in an FPC study to con-

clude that the PDOD understated the cost of exploration. (T.Tr.1156-67,JA 1881A-1881B). However,as the EIS (which the consultant had not even read on this point (T.Tr.1107,JA 1865) itself indicates (II EIS 223),the "investment costs"recited in the PDOD excluded such important items as wages for labor involved in exploratory drilling, as well as overhead, which are included by the FPC in its definition of finding costs (T.Tr. 1165,JA 1889) The consultant's blithe assumption, which he admitted was an uncertain one (T.Tr.1165-66,JA 1889-90), that he could nonetheless equate FCC "finding costs" with the "investment costs" in the PDOD -- the linchpin of his entire testimony on this point -- vitiates Judge Weinstein's finding that the PDOD arbitrarily and capriciously understated exploration costs.^{35/}

The same can be said about the court's conclusion concerning the Secretary's estimates of peak rates of production. We showed below in our post-trial submissions that the consultant was wrong on this point.^{36/} But that is not the point here.

^{35/} Judge Weinstein's determination that the total investment costs associated with Sale No. 40 were understated merely represents a synthesis of his determination that the exploration and pipeline construction costs were understated. (Dec. 50, JA 72). Thus, we need not separately deal with this aspect of his decision.

^{36/} The consultant steadfastly denied the fact that the volumes of reserves needed to support a given production rate are directly related to the rate at which the reserves are being depleted -- i.e., the slower the depletion, the greater the volume of reserves needed to achieve a given peak daily production rate. (T.Tr.1168-69). Moreover, we showed, through the use of the low estimates of oil reserves as an example and the use of a different rate of depletion than that assumed by the consultant (but nevertheless a rate consistent with production of reserves acknowledged by the consultant to occur in the Gulf of Mexico), that the daily production rates predicted in the PDOD are obtainable from the reserves estimated. (See Appendix to NOIA Reply Memo dated February 2,1977).

The real point is that the issue of production rates is meaningless. As the PDOD states:

"...these 154 tracts are located in a frontier area which has experienced no exploration by actual drilling or development, there is no assurance that petroleum in marketable quantities or any petroleum at all will be found. The extent of resources that may exist will not be precisely known for many years."
(Ex. 7, p.1, JA 3149)

Given the fact that the Secretary's decisional documents clearly evidence great uncertainty as to how much, if any, oil or gas will be found in the Sale No. 40 area, it is quite clear that the Secretary's decision to go forward with Sale No. 40 could not have turned upon any assumed level of production rates. Even assuming, therefore, that the consultant correctly testified that one hypothetical level of reserves will yield only 75,000 barrels a day, instead of the 90,000 barrels a day hypothesized in the PDOD (T.Tr. 1077-78, JA 1860-61), that error simply has no bearing upon the Secretary's decision.

As with so many other issues in this case, the discussion in MAFLA of plaintiffs' cost-benefit contention provides a fitting concluding demonstration of Judge Weinstein's error:

"[E]very attempt to assign a dollar value to future effects of present actions necessarily involves prediction. Such opinion estimates can be most precise when the systems involved are simple. As they become more complex and interactive, the ability to forecast becomes more a guess and less a prediction.

"The MAFLA [off-shore lease sale] development is in the complex, interactive category. The decision maker's task nevertheless remains the same. It is not to total up dollars and cents in a sort of profit-loss ledger, but

rather to consider the previously unconsidered by giving weight and consideration to the ecological costs to future generations in deciding whether present economic benefits indicate that the depletion of irreplaceable natural resources should proceed in the manner suggested, or not at all." 510 F.2d at 827.

The propriety of the Fifth Circuit's recognition in MAFLA of the uncertain nature of an OCS lease sale, at the time an EIS is prepared, and its excuse of Interior from engaging in the kind of precise weighing of costs and benefits required by Judge Weinstein here is conclusively demonstrated by the fact that post-sale exploratory efforts in the MAFLA region have yet to reveal any reserves of hydrocarbons there, notwithstanding the fact that more than \$1 billion was invested by the lessees at the MAFLA sale (II EIS 583). Given the uncertainty as to the existence of any reserves of oil or gas under a previously unexplored region of the OCS, like the MAFLA or the Sale No. 40 regions, it obviously made no sense to condemn the Secretary's Sale No. 40 decision on the basis of relatively minor mistakes which might have been made in calculating the production rates to be expected from hypothetical levels of reserves of oil or gas in the Sale No. 40 area.

IV. JUDGE WEINSTEIN ERRED IN DECLARING
OCS SALE NO. 40 NULL AND VOID

A. Judge Weinstein Had No Authority to
Declare Sale No. 40 Leases Null and
Void.

In the final portion of his opinion, Judge Weinstein determined that he was obliged to enter an order declaring

OCS Sale No. 40 null and void, in the same manner as though his August 13, 1976 preliminary injunction order had not been vacated by this Court. Judge Weinstein's decree rests upon an unstated, but nonetheless necessary, assumption that NEPA somehow empowers a court to cancel a lease issued under the OCS Lands Act, 43 U.S.C. § 1331 et seq. That assumption is mistaken and that mistake vitiates Judge Weinstein's decree.

The OCS Lands Act provides that all leases issued under it "shall be maintained or issued only under the provisions of this subchapter." 43 U.S.C. § 1333(a). Moreover, leases for oil and gas production must be issued for a mandatory "period of five (5) years and as long thereafter as oil or gas may be produced from the area in paying quantities." 43 U.S.C. § 1337(b).

There are, to be sure, provisions in the Act for cancellation of leases, but their very existence demonstrates the error in the assumption that leases can be cancelled because of NEPA. Under Section 1334(b)(1), a lease can be cancelled if the lessee "fails to comply with" the OCS Lands Act, the terms of his lease, or regulations applicable to his operations. And under Section 1337(i) the Secretary is given authority to "cancel any lease obtained by fraud or misrepresentation." These provisions, however, allow for cancellation

of leases only if a lessee is at fault.

That the Act does not contemplate no-fault cancellation of leases is also clearly shown by its other provisions. Thus, under Section 1341(c) and (d), the Secretary is given authority only to temporarily suspend leases, with compensation due the lessee during the period of suspension, in time of war or national emergency. Since Judge Weinstein expressly found the lessees were without fault here (Dec. 95, JA 72), there is obviously no basis in the OCS Lands Act for his decision to declare the leases null and void.

The passage of NEPA was not intended to, nor did it, change the OCS Lands Act in this respect. See Union Oil Co. v. Morton, 512 F.2d 743 (9th Cir.1975), which was called to Judge Weinstein's attention, but was ignored by him.

In Union Oil, it was argued that NEPA empowered the Secretary to cancel OCS leases by issuing environmentally-protective regulations, whose violation would constitute grounds for cancelling prior leases. This argument was squarely rejected in terms directly applicable here:

"The structure of the Act demonstrates that Congress intended vested rights under the lease to be invulnerable to the defeasance by subsequently issued regulationsCongress clearly did not intend to grant leases so tenuous in nature that the Secretary could terminate them, in whole or in part, at will." 512 F.2d at 750.

This is not to say the court repealed NEPA insofar as it deals with OCS lessees. Instead, it recognized that

"The Secretary has full authority to reconcile the objectives of the two statutes by regulating drilling under Government leases with an eye to the protection of the environmental quality of the continental shelf." 512 F.2d at 749.

However, what the Secretary does not have authority to do is to "cancel the lease because he has changed his mind." 512 F. 2d at 751. In other words, NEPA is applicable to OCS lessees to the full extent of the government's power to regulate drilling, but not to the extent of empowering the Secretary to change his mind after being instructed by a court that his prior decision was not made in full conformity with NEPA.

If NEPA does not give the Secretary powers to undo the careful scheme by which the OCS Lands Act creates fixed and certain property rights, it similarly prevents courts from taking such action. United States v. SCRAP (SCRAP I), 412 U.S. 669 (1973). There, the contention was made that NEPA relieved the courts from pre-existing limitations barring review of an ICC decision not to suspend a tariff. Recognizing that the rule preventing courts from reviewing ICC suspension orders was necessary to preserve the Interstate Commerce Act's careful balance of a carrier's authority to initiate rate changes and the ICC's authority to suspend them, the Court in SCRAP I rejected the argument that NEPA had unbalanced this careful statutory scheme. See also, Biderman v. Morton, 497 F.2d 1141 (2d. Cir. 1974), where this Court in a NEPA case declined to grant the relief demanded by plaintiffs, when it lay outside the Secretary's statutory

authority, holding that it could not "by granting injunctive relief arm the Secretary with [a] power when Congress . . . saw fit not to do so." Accord Gage v. AEC, 479 F.2d 1214 (D.C. Cir. 1973); Kitchen v. FCC, 464 F.2d 801 (D.C.Cir. 1972); Commonwealth of Pennsylvania v. FMC, 392 F.Supp. 795 (D.D.C. 1975).

The fact that plaintiffs' complaints were filed prior to Sale No. 40 and that litigation was pending with respect to the Secretary's compliance with NEPA, not the OCS Lands Act, at the time the sale took place does not mean that the NEPA violations found by Judge Weinstein justify an invalidation of the sale. If anything, the prior determinations of this Court that Judge Weinstein had wrongfully issued a preliminary injunction against the sale establishes that the transaction itself was proper at the time it took place.

Justice Marshall's opinion and the purported oral comments from the panel of this Court, which issued an interim stay of Judge Weinstein's August 13 preliminary injunction order (Dec. 93-94, JA 116-117) are not to the contrary.^{37/} Both indicated at most that, if this Court subsequently decided that the district court's August 13 order had been properly issued,

37/ There was, of course, no publically available transcript of the oral argument before this Court. Judge Weinstein's reliance upon the remarks of this Court was based upon his acceptance of plaintiffs' counsel's representations to him (Feb. 14, 1977 Tr. 46-47, JA 1935-36).

this Court might have the power to rescind the sale. Neither suggested that the transaction could be undone after a final appellate decision, such as was rendered by this Court on October 14, 1976, that the preliminary injunction itself was improper.

Our posture with respect to this question -- that under NEPA an OCS sale can be properly enjoined before it takes place, but cannot subsequently be cancelled -- is consistent with the very purpose of NEPA. As Union Oil, SCRAP I, and many other cases make clear, NEPA was designed only to ensure that the discretion or authority committed to federal officials is exercised with full awareness of the environmental implications of their actions, not to expand that discretion or authority. Prior to an OCS sale, the Secretary has discretion whether or not to hold the sale. That being so, a NEPA injunction issued prior to an OCS sale is a proper exercise of judicial power as it bears upon the Secretary's authority. After the sale, however, the Secretary has no discretion to cancel it, since OCS leases convey vested rights that can be taken from lessees only pursuant to the provisions of the OCS Lands Act. Having no such discretion, the courts cannot, in the words of this Court, use NEPA to ^{38/} "arm" the Secretary with new power.

^{38/} In addition to the questions concerning the court's power to invalidate OCS leases because of purported NEPA violations, Judge Weinstein's decision to declare Sale No. 40 null and void raises serious procedural questions. Specifically, there are now numerous third parties who hold leasehold interests

B. Judge Weinstein Erred in Assessing
the Equities and Public Interest
When Fashioning His Decree.

While Judge Weinstein recognized the proposition that NEPA does not require pre-emptive injunctive relief in every case (see p. 69, below), his treatment of the equities of the parties here and of the public interest show that in fact he ignored those considerations in fashioning his decree.

In the instant case, Judge Weinstein found the EIS deficient on a relatively few grounds, none of which go to the essence of the project. Judge Weinstein did not hold the EIS inadequate in its discussion of the basic hazards of oil spills from offshore operations and the like; instead his sole concern over environmental impact, as opposed to leasing policy or economics, had to do with the methods of transporting oil to shore which will not be employed for several years.

(footnote cont.)

on Sale 40 tracts that are not parties to this litigation. While the lower court had authority to issue a declaratory judgment with respect to the adequacy of the EIS, under FRCP 19 these absent lessees are indispensable parties to that aspect of the judgment which adjudicated the validity of their leases, and Judge Weinstein should not have proceeded to declare the sale null and void without them. See e.g., *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1325, (9th Cir. 1975), cert. denied, 425 U.S. 903 (1976);

"No procedural principal is more deeply imbedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable."

See also *McKenna v. Udall*, 418 F.2d 1171 (D.C. Cir. 1969); *Batten v. Nona-Fletcher Mineral Co.*, 198 F.2d 629, 631 (5th Cir.) cert. denied, 344 U.S. 864 (1952); *Reese v. Skelly Oil Co.*, 53 F.R.D. 548 (S.D. Miss. 1971).

On the other hand, the equities of affected private persons, government and the public in general, are immediately and seriously impacted by Judge Weinstein's decree. As the trial record adequately developed, notwithstanding Judge Weinstein's obvious impatience with NOIA's counsel in his attempts to put on evidence, substantial injury would befall industry should Sale 40 be declared null and void (see e.g., T.Tr. 1200, 1203, 1204, 1205, JA 1912, 1915, 1916, 1917).

First, the lessees have in good faith invested over \$1.1 billion in Sale No. 40 leases which has now been paid into the Treasury. Indeed, as the lower court recognized, this Court's vacation of the August 13 injunction and the government's decision to hold Sale No. 40 pursuant to the Notice of Sale left the lessees no choice but to engage in the competitive bidding for Sale No. 40 leases. As NOIA's counsel argued below:

"It has been said that the bidders knew about this litigation. I suspect all of them knew. What were they to do -- what were they to do under the circumstances [following this Court's stay]? Would Mr. Like [Suffolk County's counsel] have them get together, put their heads together, and say 'we are going to agree not to bid'?"

"THE COURT: They were in a difficult position. I appreciate the point."
(Feb. 14, 1977, Tr. 115, JA 1937)

However, when actually weighing the equities in this case, Judge Weinstein's "appreciation" of the lessees' position came to no more than his observation that they "must suffer" (Dec. 95, JA 118), notwithstanding their lack of any fault here.

Beyond the huge sums spent at Sale No. 40, the lessees have also incurred commitments running to many, many thousands

of dollars per day in anticipation of Sale 40 exploration and development. (T.Tr.1200-05, JA 1912-17). In addition, many support companies, a number of them members of NOIA, have made current commitments, ranging collectively into millions of dollars, looking toward development of the Sale 40 region (T.Tr. 1204-05, JA 1916-17).

The Government too would be severely damaged by the type of order entered by Judge Weinstein here. As spelled out below, and as Judge Weinstein recognized, the precise amounts which each of the successful bidders offered for these 93 tracts were announced at the time the sealed bids for the Sale No. 40 properties were opened and have been widely reported in the press. (T.Tr.1192,JA 1904). Plainly, if the leases are cancelled and the sale subsequently restaged, as Judge Weinstein contemplates (Dec. 94, JA 117), the new Sale No. 40 would take place under circumstances unfair both to the original bidders, whose evaluations for Sale No. 40 tracts would have been exposed, and to the federal government, whose secret bidding system would have been compromised.

Judge Weinstein's order, if not reversed, would also have a most severe impact upon the public interest. As Congress recognized, as early as 1973, shortages of oil and gas

"have created or will create severe economic dislocations and hardships, including loss of jobs, closing of factories and businesses, reduction of crop plantings and harvesting and curtailment of vital public services . . ." 15 U.S.C. §751, Act of Nov. 27, 1973. 39/

39/ The legislative history of recently passed legislation continues to recognize the need for expanded domestic production of energy, particularly from the OCS. Thus, as the Conference Committee on the 1976 Amendments to the CZMA stated, there is an acute need

(cont.)

This Court said essentially the same thing in its August 16 Order and when it recognized that

"The National interests, looking toward relief of this country's energy crisis, will be clearly damaged if the proposed sale is aborted."

Judge Weinstein did not even recognize the public interest dimension of his action, since he made no reference whatever to them.

Judge Weinstein was by no means compelled to grant the draconian relief which he has ordered. He himself recognized the flexibility which NEPA courts have to consider the particular circumstances of a case and shape an appropriate decree to deal with those circumstances. (Dec. 87-88, JA 110-111^{40/}). But incredibly, Judge Weinstein seems to have exhausted his imagination for shaping a just and equitable decree in his speculation about the creation of a new federal-state-local agency. He gave no thought whatever to directing the Secretary to prepare (as Secretary Andrus has announced he will) a subsequent EIS on the

(footnote cont.)

"to encourage new or expanded oil and natural gas production in an orderly manner from the Nation's outer Continental Shelf (OCS) . . . [as part of the] attainment of a greater degree of energy self-sufficiency . . . a recognized national objective of the highest importance and priority." (Report of the Committee of Conference No. 94-987, June 24, 1976, p. 23).

40/ See also *Greene County Planning Board v. FPC*, 455 F.2d 412 (2nd Cir.) cert. denied, 409 U.S. 849 (1972) (declining to halt construction of power lines since "there [was] no indication . . . of obstinate refusal to comply with NEPA"); *EDF v. Froehlke*, 348 F. Supp. 338 (W.D. Mo. 1972), aff'd, 477 F.2d 1033 (8th Cir. 1973) (declining to halt construction work on a dam that was largely completed); *Concerned About Trident v. Rumsfeld*, ___ F.2d ___, 9 ERC 1370 (D.C. Cir. 1976) (where the court remanded for a supplemental EIS without an injunction against ongoing activities, since the EIS was inadequate in only two respects.)

production phase itself, so as to insure that pipeline corridors are studied in an impact statement before pipelines are actually laid.

That the lower court failed even to consider such relief and instead entered a decree which would have a lasting and pervasive adverse impact upon the public, government, industry and its employees is simply a further indication of the misconceptions of the law and of the facts which underlay the conduct of the proceedings below.

CONCLUSION

For the reasons stated above, Judge Weinstein's decision of February 17, 1977, should be reversed.

Respectfully submitted,

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March 25, 1977

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SECRETARY OF THE INTERIOR, et al.	)	
	)	
Appellants	)	
	)	
v.	)	No. 77-1049
	)	
COUNTY OF SUFFOLK, et al.,	)	
	)	
Appellees	)	

CERTIFICATE OF SERVICE

I, E. Edward Bruce, hereby certify that copies of the finalized version of the Brief of Appellants National Ocean Industries Association, et al., as well as copies of their Reply Brief were served this 15th day of April, 1977, upon the following persons:

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